

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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PLANS, INC.,

Plaintiff,

v.

NO. CIV. S-98-266 FCD EFB

MEMORANDUM AND ORDER

SACRAMENTO UNIFIED SCHOOL  
DISTRICT, TWIN RIDGES  
ELEMENTARY SCHOOL DISTRICT,  
DOES 1-100,

Defendants.

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This case comes before the court on plaintiff PLANS, Inc.'s ("plaintiff") motion to augment its trial exhibit list, previously included with the court's final pretrial conference order, and which governed the initial trial in this matter.<sup>1</sup> (Docket #229.) On September 28, 2005, the court entered judgment

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<sup>1</sup> Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 230(g).

1 in favor of defendant Sacramento City Unified School District  
2 ("SCUSD"), pursuant to Federal Rule of Civil Procedure 52(c), on  
3 the ground plaintiff failed to meet its evidentiary burden to  
4 establish that anthroposophy is a religion for purposes of the  
5 Establishment Clause. On November 21, 2007, the Ninth Circuit  
6 reversed this court's judgment, finding that the court erred in  
7 excluding certain witnesses' percipient testimony. The Ninth  
8 Circuit held that "because [plaintiff] intended to call [Betty  
9 Staley, Crystal Olsen and Robert Anderson] . . . as percipient  
10 witnesses, it did not need to comply with the court's deadline  
11 for expert disclosures." (Docket #281.) This court had found  
12 that the subject witnesses' proffered testimony was *expert*  
13 opinion, and having failed to timely disclose the testimony,  
14 plaintiff was precluded from offering it at trial. The Ninth  
15 Circuit disagreed, and further emphasized that there was no  
16 prejudice to SCUSD because plaintiff had disclosed the witnesses  
17 as early as January 2001 and the district, itself, had designated  
18 the witnesses as experts. (*Id.*)

19 Following the remand, this court granted defendant Twin  
20 Ridges Elementary School District's motion to dismiss, leaving  
21 SCUSD as the sole defendant. (Docket #295 [dismissing Twin  
22 Ridges since as of June 30, 2007, it ceased chartering any  
23 Waldorf method public schools].) Following this order, filed  
24 March 4, 2008, there was no activity in the case until May 29,  
25 2009, when plaintiff filed a substitution of attorney, replacing  
26 Scott Kendall with Donald Michael Bush. The parties thereafter  
27 requested extensions of time to file a joint status conference  
28 statement. The court held a status conference on December 11,

1 2009.

2 At that conference, the court set (1) a further final  
3 pretrial conference; (2) a trial date for Phase I of the trial  
4 (to determine whether anthroposophy is a religion for  
5 Establishment Clause purposes); and (3) a hearing date, in  
6 advance of trial, for the parties' motions in limine. (Docket  
7 #306.)<sup>2</sup> Plaintiff indicated that it may wish to move the court  
8 to reopen discovery to permit plaintiff to modify its proffered  
9 witnesses and evidence for trial. The court emphasized that the  
10 Ninth Circuit's remand order only permitted plaintiff to offer at  
11 trial the percipient testimony of Staley, Olsen and Anderson; it  
12 did not permit plaintiff to reopen discovery or otherwise modify  
13 the court's prior final pretrial conference order. The court  
14 directed that if plaintiff sought any such actions, it must file  
15 an appropriate motion under Rule 16.

16 By the instant motion, plaintiff does not seek to reopen  
17 discovery but rather requests permission to modify its trial  
18 exhibit list to delete certain original exhibits and add other  
19 documents in support of its position that anthroposophy is a  
20 religion. At this juncture, the court will permit plaintiff to  
21 modify its exhibit list, as typically, the court does not render  
22 any rulings with respect to proffered exhibits until trial. In  
23 preparing their joint final pretrial conference statement,  
24 parties submit with the statement their expected witnesses and  
25 trial exhibits, which the court simply attaches as exhibits to

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27 <sup>2</sup> Said dates were subsequently modified by Minute Order  
28 of April 12, 2010 (Docket #313) due to plaintiff's request to  
continue the final pretrial conference date.

1 its final pretrial conference order. (See e.g. Docket #229.)  
2 Thereafter, at the time of trial, normally during the hearing on  
3 motions in limine, the court rules on any objections to the  
4 parties' respective witnesses and trial exhibits. The court will  
5 follow its typical procedures in this case as well.

6 Therefore, both parties may file with their joint pretrial  
7 conference statement amended witness and exhibit lists. Each  
8 side may later object to the witnesses or exhibits, including on  
9 the ground that the testimony and/or exhibit was not disclosed  
10 during the course of discovery, at the time of the hearing on the  
11 parties' motions in limine. Where appropriate, the parties shall  
12 file separate motions in limine directed at specific evidence,  
13 supported by a memorandum of points and authorities. At that  
14 point, on full briefing, the court can properly consider possible  
15 evidentiary objections, including relevancy, hearsay and  
16 authentication.

17 Pursuant to the court's Minute Order of April 12, 2010  
18 motions in limine will be heard on August 13, 2010, and trial of  
19 Phase I will commence on August 31, 2010. At the December 2009  
20 status conference, the court directed the parties to summarize,  
21 in their joint final pretrial conference statement, each witness'  
22 expected testimony, including any percipient testimony and/or  
23 expert opinion. To facilitate the court's ruling on any  
24 objections to the trial exhibits, the court orders the parties to  
25 exchange all trial exhibits on or before August 2, 2010. If a  
26 party moves to exclude any exhibit, it shall submit a copy of the  
27 subject exhibit with its motion in limine. Provision of the  
28 parties' final, trial exhibit binders will be as directed in the

1 court's final pretrial conference order, which shall issue  
2 following the conference set for June 25, 2010.

3 IT IS SO ORDERED.

4 DATED: April 19, 2010

A handwritten signature in black ink, appearing to read "Frank C. Damrell, Jr.", written in a cursive style.

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7 FRANK C. DAMRELL, JR.  
UNITED STATES DISTRICT JUDGE  
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